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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MONTANA**
**BUTTE DIVISION**

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| ATLANTIC RICHFIELD COMPANY,<br><br>Plaintiff,<br><br>vs.<br><br>GREGORY A. CHRISTIAN, et al.,<br><br>Defendants. | Cause No.<br>2:15-cv-00083-BMM-JCL<br><br>**PLAINTIFF ATLANTIC RICHFIELD COMPANY'S COMBINED REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** |

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## Cases

**Statutes and Rules**

COMES NOW Plaintiff Atlantic Richfield Company ("Atlantic Richfield"), by and through its counsel of record, and hereby submits its combined reply in support of its Motion for Summary Judgment ("Atlantic Richfield's Motion") (Dkt. 21) and response to Defendants' Motion for Summary Judgment ("Landowners' Motion") (Dkt. 33).

## INTRODUCTION

Defendants ("Landowners") own properties within the boundaries of the Anaconda Smelter Superfund Site (the "Site"), where the United States Environmental Protection Agency ("EPA") has directed cleanup activities for over thirty years through its authority under CERCLA. In a state court action, Landowners assert multiple claims for property damages related to the historic smelting operations that are the subject of EPA's CERCLA cleanup, and propose an environmental "restoration" plan that conflicts with EPA's selected remedy for the Site. Landowners criticize EPA's regulatory process and selection of environmental remedies, and request a ruling from the state court that their preferred remedy can and should be performed at the Site, even where their proposed restoration actions are inconsistent and would interfere with the ongoing CERCLA cleanup. This is precisely the type of improper attack on EPA's selected remedy that is barred by CERCLA §113(h), 42 U.S.C. § 9613(h). Accordingly, Atlantic Richfield initiated this action, seeking a declaration that Landowners'

alternative remediation plan constitutes an impermissible "challenge" to EPA's selected remedy, and an injunction barring Landowners from performing their proposed plan.

In Landowners' Motion, they contend that the Anti-Injunction Act prevents this Court from deciding the merits of Atlantic Richfield's claims because the same issue is currently pending in state court. The Anti-Injunction Act, however, was neither designed nor intended to bar a federal district court from adjudicating a claim properly within its jurisdiction—in this case, within its exclusive jurisdiction—merely because the same or similar issues have been raised in a state court.

On the merits, Landowners' arguments regarding § 113(h)'s ban on challenges to EPA's selected remedy for a Superfund site are based on irrelevant legislative history and ignore controlling Ninth Circuit precedent. Because Landowners' proposed restoration plan is related to the goals of the CERCLA cleanup and seeks environmental remedies beyond those selected by EPA, it constitutes an impermissible "challenge" under § 113(h). Atlantic Richfield is therefore entitled to summary judgment as a matter of law.[1]

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[1] Landowners' response to Atlantic Richfield's statement of undisputed facts mischaracterizes the evidence cited, quibbles over the significance of the facts asserted by Atlantic Richfield rather than disputing the facts themselves, and adds immaterial allegations to the facts asserted by Atlantic Richfield. (*See generally*

## ARGUMENT

### I. ATLANTIC RICHFIELD'S CLAIMS ARE NOT BARRED BY THE ANTI-INJUNCTION ACT.

The Anti-Injunction Act (the "Act") provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The Act does not apply to Atlantic Richfield's claims because Atlantic Richfield does not seek to stay proceedings in a state court or to enjoin Landowners from prosecuting their claims in state court. Even if the Act applied, however, Atlantic Richfield's claims would fall within the statutory exceptions.

#### A. Atlantic Richfield's claims do not implicate the Anti-Injunction Act.

The "threshold question" in determining whether the Act applies is whether the relief sought in the federal district court "constitutes 'an injunction to stay [state court] proceedings.'" *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 805 (9th Cir. 2002) (quoting § 2283); *see also Am. Carriers, Inc. v. Baytree Inv'rs, Inc.*, No. CIV. A. 88-2067-O, 1988 WL 485499, at *1 (D. Kan. June 10, 1988) ("The first

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Defs.' Statement of Disputed Facts (Dkt. 37).) As Landowners concede, however, the basic facts relevant to the limited questions presented to this Court are undisputed and there are no genuinely disputed material facts that would preclude summary judgment. (*See* Jt. Mot. to Vacate Pretrial Conf. (Dkt. 24) at 3.)

step in analyzing how the Anti–Injunction Act affects an injunction issued by a federal court is determining whether the action taken by the federal court falls within the ambit of the Act."). Landowners have not—and cannot—make this threshold showing.

In this action, Atlantic Richfield seeks:

> a. A declaratory judgment that [Landowners'] proposed soils and groundwater restoration actions constitute impermissible "challenges" to EPA's selected remedy for the Anaconda Smelter Superfund Site, and are therefore barred by CERCLA, 42 U.S.C. § 9613(h); [and]
>
> b. An injunction enjoining [Landowners] from performing their proposed soils and groundwater restoration actions at the Anaconda Smelter Superfund Site because they are impermissible "challenges" to EPA's selected remedy for the Site, and therefore barred by CERCLA, 42 U.S.C. § 9613(h) ….

(Compl. at 31.) Such relief, if granted, would neither enjoin the state court proceeding nor inhibit Landowners from prosecuting their claims in state court.

Landowners have asserted multiple causes of action in state court, including trespass, private and public nuisance, strict liability, negligence, and wrongful occupation.[2] (*See* State Ct. Third Am. Compl. (Ex. B to Compl.) ¶¶ 16-42.) Landowners also seek multiple categories of damages, including compensation for loss of use and enjoyment of their properties, diminution of value, relocation

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[2] Landowners also asserted claims for unjust enrichment and constructive fraud, but the Montana Supreme Court affirmed dismissal of these claims as barred by the statute of limitations. *See Christian v. Atl. Richfield Co.*, 358 P.3d 131, 149 n.8, 151, 157 (Mont. 2015).

expenses, loss of rental income and/or value, annoyance, inconvenience discomfort, and "restoration" costs. (*Id.* ¶ 43.)

Atlantic Richfield is not asking this Court to decide *any* of Landowners' state court claims or to enjoin Landowners from pursuing such claims. Nor is Atlantic Richfield asking this Court to foreclose any type of damages in the state court action. Instead, this Court is presented with a discreet question of federal law: whether Landowners' proposed alternative environmental remedy constitutes an impermissible "challenge" to EPA's approved remedy for the Site under CERCLA § 113(h). As Atlantic Richfield has repeatedly emphasized, whether and how this Court's decision affects Landowners' state court claims is properly left to the state court to decide. By contrast, in the cases Landowners cite, the plaintiffs expressly sought to enjoin state court proceedings or to preclude opposing parties from pursuing their claims in state court.

For example, in *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, the Court found that the sole purpose of the federal action was to enjoin the state court proceedings regarding a supersedeas bond. 309 U.S. 4, 8 (1940). Because the federal action explicitly sought an injunction to stay the state court action, it was impermissible. *Id.* at 8-9. Similarly, in *Alton Box Board Co. v. Esprit de Corp.*, the plaintiffs sought an injunction expressly precluding the defendant from pursuing its state law anti-trust claims in state court. 682 F.2d 1267, 1269-70 (9th

Cir. 1982). Unlike in *Oklahoma Packing* and *Alton*, this Court's adjudication of Atlantic Richfield's claims would not actually or effectively enjoin the state court proceedings, nor would it enjoin Landowners from pursuing their claims in state court.

The other cases cited by Landowners are similarly inapposite. In *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), *Hill v. Martin*, 296 U.S. 393 (1935), and *Imperial County v. Munoz*, 449 U.S. 54 (1980), the Supreme Court addressed situations in which the state court had already ruled on an issue and the federal action was brought to effectively set aside or enjoin enforcement of the state court decision. As the Court explained, such an injunction is improper because "lower federal courts possess no power whatever to sit in direct appeal of state court decisions." *Atl. Coast Line*, 398 U.S. at 296.[3]

Landowners maintain because Atlantic Richfield requests that this Court decide an issue that has been briefed and is pending in state court, Atlantic Richfield's claims "ha[ve] the same effect as enjoining the [state] court …." (Defs.' Br. (Dkt. 34) at 5.) This is incorrect. The Act does not bar a federal court

[3] Landowners also cite *Samuels v. Mackell*, 401 U.S. 66, 69 (1971). That case did not concern the Anti-Injunction Act, but rather addressed the question of whether the rule that "a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit" applied to claims for declaratory relief that would have the same effect. *Id.*

from deciding an issue of federal law within its exclusive original jurisdiction simply because the same or a similar issue is also pending in state court. To the contrary, one of the primary purposes of the Act is to *permit* concurrent jurisdiction by prohibiting federal courts from enjoining state court proceedings solely because they concern the same subject matter. *See Atl. Coast Line*, 398 U.S. at 295 ("[T]he state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts."); *Bennett*, 285 F.3d at 806 ("The Act creates a presumption in favor of permitting parallel actions in state and federal court."); *Alton*, 682 F.2d at 1272-73 ("The Supreme Court has emphasized that such actions may proceed concurrently in federal and state courts without interference from either judicial system.").[4] Landowners' novel contention that a federal court's exercise of jurisdiction over an issue concurrently pending in state court effectively constitutes an injunction of the state court proceedings cannot be reconciled with these well established principles.

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[4] This is consistent with the established rule that "[a] concurrent action pending in state court is normally no bar to proceedings concerning the same matter in the federal court having jurisdiction." *Tucker v. First Md. Sav. & Loan, Inc.*, 942 F.2d 1401, 1407 (9th Cir. 1991); *see also Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) ("Generally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court ....").

Finally, unlike the cases cited by Landowners, where the sole purpose for the requested relief was to enjoin the state court proceedings, Atlantic Richfield's claims are not dependent on the pendency of Landowners' state court action. As explained below and in Atlantic Richfield's Motion, Landowners' alternative restoration plan is incompatible with EPA's selected remedy for the Anaconda Smelter Superfund Site, a remedy which Atlantic Richfield has been ordered to perform and will be assessed penalties by EPA if it fails to perform. Landowners' proposed restoration project would obstruct the ongoing remedial activities Atlantic Richfield is currently conducting at EPA's direction, and threatens to exacerbate contamination issues at the Site. Atlantic Richfield could have—and likely would have—brought this action to enjoin Landowners from performing a conflicting restoration plan at the Site *even if the state court lawsuit had never been filed.* The Act certainly would not bar Atlantic Richfield from asserting identical claims in the absence of a state court lawsuit. The fact that Landowners presented their restoration plan in the context of a state court lawsuit asserting common law property damage claims does not bring Atlantic Richfield's claims within the scope of the Act. Therefore, the Act does not prevent Atlantic Richfield from obtaining the declaratory and injunctive relief on a matter of federal statutory interpretation that it seeks from this Court.

Because Landowners cannot establish that the relief Atlantic Richfield seeks in this action would effectively stay the state court proceedings, their Anti-Injunction Act argument fails.[5]

### B. Even if the Act applied, Atlantic Richfield's claims would fall within the statutory exception for injunctions necessary to preserve the Court's jurisdiction.

Landowners' Anti-Injunction Act argument is particularly misplaced because, even if Atlantic Richfield actually sought to enjoin the state court proceedings, its claims would fall within the statutory exception for actions necessary in aid of the federal court's jurisdiction.

The Act contains three statutory exceptions for: (1) injunctions authorized by act of Congress; (2) injunctions necessary in aid of the federal court's jurisdiction; and (3) injunctions necessary to protect or effectuate a federal court's judgments. 28 U.S.C. § 2283. The Supreme Court has explained that the exceptions to the Act "are designed to ensure the effectiveness and supremacy of federal law." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988). If one of these statutory exceptions applies, a federal court is affirmatively authorized to

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[5] Much of Landowners' brief is devoted to arguing (1) that the Act applies to declaratory judgments that would have the same effect as injunctions, and (2) that a litigant cannot circumvent the Act by asserting claims against another litigant rather than directly against the state court. (*See* Defs.' Br. at 4-6.) Because Landowners fail to establish the "threshold" issue that Atlantic Richfield's claims, if granted, would effectively constitute "an injunction to stay [state court] proceedings," *Bennett*, 285 F.3d at 805, these arguments are irrelevant.

enjoin a state court proceeding pursuant to the All-Writs Act, 28 U.S.C. § 1651(a). *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 143 (3d Cir. 1998).

In areas where a statute confers exclusive jurisdiction on federal courts, a federal district court may enjoin a state court action that threatens to infringe upon this exclusive jurisdiction under the necessary-in-aid-of-jurisdiction exception. *See Capital Serv. v. NLRB*, 347 U.S. 501, 504 (1954) ("[W]here Congress, acting within its constitutional authority, has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right."); *In re Birting Fisheries, Inc.*, 300 B.R. 489, 501 n.12 (B.A.P. 9th Cir. 2003) ("[W]hen the federal court has exclusive jurisdiction, it does not violate full faith and credit, the *Rooker–Feldman* doctrine or the Anti–Injunction Act by enjoining a state court proceeding."); *see also Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 540 (9th Cir. 1994) (applying the second exception to the Act where "[t]he injunction was necessary to preserve exclusive federal jurisdiction").

Here, CERCLA § 113(b) provides that "the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter." 42 U.S.C. § 9613(b). This includes "challenges" to EPA's selected

remedy under § 113(h). *Fort Ord Toxics Project, Inc. v. Cal. EPA*, 189 F.3d 828, 832 (9th Cir. 1999). Thus, even if the declaratory and injunctive relief sought by Atlantic Richfield effectively enjoined the state court proceeding—which it does not—this action would fall under the Act's second exception.

## II. LANDOWNERS' PROPOSED RESTORATION PLAN IS BARRED BY CERCLA § 113(h).

Landowners seek to circumvent CERCLA's statutory and regulatory processes for the selection, construction, and long-term maintenance of EPA's selected remedy in order to perform a "restoration" at the Site that meets their own subjective cleanup standards. Such a challenge to an ongoing Superfund cleanup is prohibited by CERCLA § 113(h).

### A. CERCLA § 113(h) bars "*all* challenges" to ongoing cleanups.

Landowners repeat the same arguments in their Motion for Summary Judgment that they asserted in their Motion to Dismiss, relying on CERCLA's convoluted legislative history to (1) limit the application of § 113(h) to challenges asserted by "polluters" and (2) exclude any challenges relating to state law property damage claims. (*See* Defs.' Br. at 10-13; Defs.' Mot. to Dismiss Br. (Dkt. 15) at 20-23.) These arguments are contradicted by the plain language of the statute and binding Ninth Circuit precedent.

First, the Ninth Circuit considered—and rejected—the argument that § 113(h) applies only to "polluters" in *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 328-29 (9th Cir. 1995). Like Landowners here, the plaintiffs in *McClellan* cited the statute's legislative history to support their argument that § 113(h) applied only to "challenges brought by potentially responsible parties." *Id.* at 328. The court disagreed, finding that "[t]his argument is contradicted by the plain words of the statute." *Id.* As the court explained, "[t]he prohibitory language of Section 113(h) does not distinguish between plaintiffs. The statute divests federal courts of jurisdiction over 'any challenges' to removal or remedial actions under CERCLA." *Id.* Moreover, the court specifically rejected the invocation of legislative history to limit the scope of § 113(h), noting "[b]ecause the statutory language [of § 113(h)] is so clear, [plaintiffs] must overcome a strong presumption that the plain language of the statute expresses Congress' intent. For [plaintiffs'] purposes, the legislative history of Section 113(h) is, at best, unclear." *Id.* at 328 n.4 (citation omitted).

Just as in *McClellan*, Landowners reliance on legislative history to contradict the plain language of the statute here is improper. *See Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 834-35 (9th Cir. 1996) ("[T]his Circuit … recognizes the principle that [l]egislative history—no matter how clear—can't override statutory text. Where the statute's language can be construed in a

consistent and workable fashion, [this Court] must put aside contrary legislative history." (citation omitted)). Section 113(h), by its own terms, bars "any challenges to [CERCLA] removal or remedial action[s] …." 42 U.S.C. § 9613(h) (emphasis added). This language "is clear and unequivocal." *McClellan*, 47 F.3d at 328. The legislative history cited by Landowners is therefore irrelevant. *Id.*; *see also Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material.").

Landowners' reliance on legislative history to argue that § 113(h) does not apply to remedies premised on state law is similarly misplaced. (*See* Defs.' Br. at 11-13.) Landowners cite several snippets of legislative history supporting the proposition that § 113(h) does not preclude property owners from asserting state law nuisance claims. (*Id.* at 11-12.) The pertinent issue here, however, is not whether Landowners may pursue their state law claims in state court, but whether Landowners' proposed remediation plan constitutes a challenge under CERCLA § 113(h). If it does, it is barred regardless of whether the remedy is sought in conjunction with state law property damage claims. *See Fort Ord*, 189 F.3d at 832 (holding that § 113 "cover[s] any 'challenge' to a CERCLA cleanup" even if brought under state law); *see also ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality of Mont.*, 213 F.3d 1108, 1115 (9th Cir. 2000) (same).

Even the legislative history cited by Landowners acknowledges that state law claims are only permissible under § 113(h) to the extent the remedies sought therein "do not conflict with [CERCLA]." (*See* Defs.' Br. at 12 (quoting 132 Cong. Rec. 29,737 (1986)).) Because Landowners' proposed remediation plan constitutes a challenge to EPA's selected remedy for the Site, it is barred by CERCLA § 113(h).

### B. Landowners' proposed environmental remedy constitutes a "challenge" under CERCLA § 113(h).

Landowners contend that § 113(h) does not bar their alternative remediation plan because they are not overtly "challenging" EPA's selected remedy. (*See id.* at 13-21.) The undisputed evidence, however, demonstrates that Landowners' proposed remedy is related to the goals of the CERCLA cleanup and seeks to improve upon that cleanup. Under Ninth Circuit precedent, such a remedy constitutes a "challenge" for purposes of § 113(h).

Contrary to Landowners' conclusory assertion, "challenges" are *not* "narrowly construed in the context of § 113(h)." (Defs.' Br. at 13.) Rather, "[a]n action constitutes a challenge if it *is related to the goals of the cleanup*." *Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 239 (9th Cir. 1995) (emphasis added). "Challenges" include, among other things, any action in which a party seeks "to dictate specific remedial actions; to postpone the cleanup; to impose additional reporting requirements on the cleanup; or to … alter the method and order of

cleanup." *ARCO Envtl. Remediation*, 213 F.3d at 1115 (citations omitted). A party "challenges" a CERCLA cleanup if it "interfere[s] with the remedial actions selected under CERCLA," or "*seeks to improve on the CERCLA cleanup.*" *McClellan*, 47 F.3d at 330 (emphasis added).

Here, Landowners have explicitly rejected EPA's chosen remedy as inadequate and propose an alternative remediation plan, which includes, *inter alia*, their own action levels for soil and water remediation, the removal and transport of 650,000 tons of soil, and the construction of an 8,000-foot-long underground wall to divert the flow of groundwater. (*See* Atlantic Richfield's Br. (Dkt. 22) at 9-11.) Rather than disputing these facts, Landowners accuse Atlantic Richfield of "mischaracteriz[ing] [their] expert reports." (Defs.' Br. at 20.) For example, Landowners claim that their toxicologist, Richard Pleus, does not criticize *EPA's* risk assessment for the Site, but rather he "critiqued a risk assessment completed … by CDM Federal Programs Corp." (*Id.* at 20.) This argument is misleading. CDM is a contractor for EPA. The Baseline Human Health Risk Assessment Dr. Pleus criticizes was conducted for and at the behest of EPA.[6] In rejecting CDM's findings, Dr. Pleus rejected EPA's findings.

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[6] *See* Final Baseline Health and Human Risk Assessment (Dkt. 31-14), at 3 ("Prepared for: UNITED STATES ENVIRONMENTAL PROTECTION AGENCY"), and 19 ("CDM Federal Programs Corporation (CDM Federal) has been tasked by the U.S. Environmental Protection Agency (EPA), Region VIII to

There is no dispute that Dr. Pleus explicitly criticizes and rejects the 250 ppm arsenic action level selected by EPA in the CSOU ROD. (*See* Pleus Suppl. Expert Rep, Ex. 4 to Henderson Aff. (attached to Atlantic Richfield's Statement of Disputed facts), at 20-21 ("The key question that I have been asked to address is whether the action level of 250 ppm set for arsenic in residential soil at the Anaconda Smelter NPL Site was developed in a manner consistent with generally accepted risk assessment practices and is appropriately health protective.... I conclude that ... the 250 ppm action level ... is not appropriately health protective.").) In addition, just this week Landowners disclosed another expert, William Meggs, who similarly directly challenges EPA's selected action level for the Site. (*See* Pls.' Supp. Expert Witness Disclosure, Ex. 5 to Henderson Aff., at 2, ¶ 3 (The "plan to remove only that soil which exceeds 250 parts per million arsenic and 400 parts per million lead does not sufficiently limit the risks posed to residents of Opportunity. Those levels are in excess of known human health standards.").)

Landowners' expert John Kane also challenges the ongoing CERCLA cleanup—notwithstanding the fact that he never explicitly references "EPA's

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evaluate the potential for adverse human health effects to occur as the result of exposure to chemicals from ongoing and historic releases from the Anaconda Smelter National Priorities List (NPL) Site."); CSOU ROD (Dkt. 31-10), at DS-44-DS-45 (explaining that EPA used the Final Baseline HHRA to establish the 250 ppm arsenic concentration soil action level for the Site).

chosen remedies." (Defs.' Br. at 20.) Mr. Kane unilaterally calculates his own "background concentrations of arsenic and other heavy metals" at the Site and then proposes an extensive soils and groundwater remediation plan to "restore" Landowners' properties to these background levels, levels that he concedes are "contrary to the findings … of the ARWW&S OU Final Site Characterization Report" (Kane Rep. (Ex. D to Compl.) at 3-6). (*Id.* at 10-11.) Because Mr. Kane's proposed plan "is related to the goals of the [CERCLA] cleanup," *Razore*, 66 F.3d at 239, and seeks "to improve on the CERCLA cleanup," *McClellan*, 47 F.3d at 330, it constitutes a challenge under § 113(h).

Landowners' attempt to distinguish the relevant caselaw applying § 113(h) is unavailing. (Defs.' Br. at 16-19.)[7] For example, Landowners misstate the facts and holding from *New Mexico v. General Electric Co.*, 467 F.3d 1223 (10th Cir. 2006). Landowners represent that the plaintiff's state law claims in *New Mexico* failed under state law, and only the remaining CERCLA claim constituted a challenge under § 113(h). (Defs.' Br. at 16-17.) To the contrary, the plaintiff in

[7] Landowners also rely heavily on *Samples v. Conoco, Inc.*, 165 F. Supp. 2d 1303 (N.D. Fla. 2001). (Defs.' Br. at 11-15.) As explained in Atlantic Richfield's Motion, the factual situation in *Samples* is inapposite as the court did not address the question of whether an alternative restoration project itself constituted a challenge under § 113(h), but instead addressed a measure of monetary damages. (*See* Atlantic Richfield's Br. at 24-26.) More importantly, *Samples* lacks even persuasive value here as the court "decline[d] to follow" the line of authority from the Ninth Circuit to the extent those cases interpreted section 113(h) more broadly than *Samples* did. 165 F. Supp. 2d at 1315.

*New Mexico* had voluntarily dismissed all CERCLA claims "effectively ending any entitlement the [plaintiff] may have had to NRDs under CERCLA," 467 F.3d at 1237, and pursued natural resource damages under its state law nuisance and negligence claims. *See id.* at 1238, 1252. As here, the *New Mexico* plaintiff's claims were based on the presumption that "the CERCLA-mandated remediation process [wa]s both underinclusive and inadequate" in that it would not completely remediate all of the alleged contamination. *Id.* at 1248. And as here, the plaintiff "argue[d] the EPA [did] not apply[] the 'proper remediation standard[s],'" and "attack[ed] the remediation as 'limited in scope.'" *Id.* at 1249. "Because the [plaintiff's] lawsuit call[ed] into question the EPA's remedial response plan," the court concluded that "it [wa]s related to the goals of the cleanup, and thus constitute[d] a 'challenge' to the cleanup under § 9613(h)." *Id.*

Landowners similarly mischaracterize the Ninth Circuit's holding in *Razore.* Landowners suggest that the plaintiff's claims in *Razore* were dismissed because the plaintiff could not pursue its RCRA and CWA claims as a private party. (Defs.' Br. at 18.) That issue, however, was not addressed by the court. Instead, the court held that "[a]n action constitutes a challenge if it is related to the goals of the cleanup," 66 F.3d at 239, and found that the plaintiff's "RCRA and CWA

claims [we]re sufficiently related to the goals of CERCLA cleanup to trigger section 113(h)." *Id.* at 240.[8]

Landowners' attempt to distinguish *McClellan* also fails. In that case, the plaintiff argued that its RCRA claim was not a challenge under § 113(h) because it was not attempting to delay or modify the EPA's selected remedy. 47 F.3d at 330-31. The Court held that, while some tangentially related claims may not constitute challenges, the plaintiffs' claim was "directly related to the goals of the cleanup itself." *Id.* at 330. The Court concluded that for "all practical purposes" the plaintiff was seeking to "improve" upon the cleanup. *Id.* As such, the plaintiff's claim was a challenge under § 113(h). *Id.*

Landowners argue that *McClellan* does not apply because it did not concern state law claims. (Defs.' Br. at 19.) This is a distinction without a difference. *McClellan* specifically held that *all* claims that challenge an ongoing CERCLA cleanup are barred by § 113(h). 47 F.3d at 328. There is simply no basis in the statute or caselaw supporting Landowners' assertion that this statutory bar does not

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[8] Landowners also assert that *Razore* supports their argument that § 113(h) only applies to "polluters." (Defs.' 18-19.) Nothing in *Razore* purports to limit the application of § 113(h) in this manner. To the contrary, *Razore* unequivocally states that § 113(h) "bans *all* challenges to ongoing remedial or removal actions." 66 F.3d at 238 (emphasis added).

apply to their proposed remedy simply because it was asserted in conjunction with state law claims.[9]

Finally, Landowners' contention that their proposed remediation plan is not subject to § 113(h) because they intend to "remove contamination" and "restore" their properties is unfounded. (Defs.' Br. at 19.) "Challenges" under § 113(h) include actions to hinder the cleanup as well as actions seeking to alter or improve upon the cleanup. *See Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1220 (9th Cir. 2011) ("[W]here the EPA works out a plan, and a citizen suit seeks to improve on the CERCLA cleanup because it 'wants more,' that constitutes interference. Such a claim would second-guess the parties' determination and thus interfere with the remedial actions selected …."); *Hanford Downwinders Coal v. Dowdle,* 71 F.3d 1469, 1482 (9th Cir. 1995) (Even "injunctive relief that for all practical purposes, seeks to improve on [a] CERCLA cleanup ... qualifies as a 'challenge' to the cleanup."). EPA has not approved Landowners proposed alternative remedy. (Atlantic Richfield's Statement of Undisputed Facts ("SUF"),

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[9] To the extent that Landowners suggest that § 113(h) only applies to challenges asserted in federal court, they are mistaken. *See Fort Ord*, 189 F.3d at 832 ("We believe Congress only removed federal court jurisdiction from 'challenges' to CERCLA cleanups because only federal courts shall have jurisdiction to adjudicate a 'challenge' to a CERCLA cleanup in the first place…. [C]ongressional intent is best effectuated by reading § 113(b)'s exclusive jurisdiction provision to cover any 'challenge' to a CERCLA cleanup. Thus, § 113(h), by postponing the jurisdiction of federal courts, postpones jurisdiction over CERCLA challenges from the only courts that have jurisdiction to hear such challenges.").

Dkt. 23, ¶ 60.) To the contrary, EPA considered and rejected soils and groundwater remedies similar to those proposed by Landowners' experts. (SUF ¶¶ 56-58.) Landowners' proposed remedy constitutes a challenge to EPA's selected remedy for the Site, and is therefore barred by § 113(h).

### C. Atlantic Richfield's claims are not based on preemption.

Landowners devote four pages of their brief to arguing that CERCLA does not *preempt* their state law claims. (Defs.' Br. at 22-26.) This is a strawman argument. Whether CERCLA preempts Landowners' common law property damages claims in state court is not an issue before this Court, nor is preemption the basis for Atlantic Richfield's request for declaratory and injunctive relief. The sole issue before this Court is whether Landowners' proposed remedy violates CERCLA § 113(h)'s bar on challenges to ongoing cleanups. Landowners' discussion of preemption principles is misleading and irrelevant.[10]

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[10] Landowners reassert their argument that CERCLA's "savings provisions" provide for their proposed remedy within their broader preemption argument. (Defs.' Br. at 22-23.) Landowners rely principally on CERCLA § 302(d), 42 U.S.C. § 9652(d). (*Id.*) As discussed in Atlantic Richfield's Brief, Landowners ignore the specific savings clause addressing whether § 113(h) can be applied to preclude state law remedies. (Atlantic Richfield's Br. at 18-20.) That provision, 42 U.S.C. § 9659(h), states that "[CERCLA] does not affect or otherwise impair the rights of any person under Federal, State, or common law, *except with respect to the timing of review as provided in section [113(h)] of this title* …." (emphasis added); *see also Razore*, 66 F.3d at 240 ("[I]f section 302(d) were to govern the interpretation of the statute, it would effectively write [section 113(h)] out of the Act."); *Anacostia Riverkeeper v. Wash. Gas Light Co.*, 892 F. Supp. 2d 161, 171

### D. The application of § 113(h) would not lead to "absurd" results.

Finally, Landowners argue that Atlantic Richfield's "interpretation" of § 113(h) would lead to "absurd" or "irrational" results because (1) it "requires a federal bar to all claims seeking restoration damages at CERCLA sites" and (2) it would allow Atlantic Richfield to use an environmental regulation "to provide protection to polluters." (Defs.' Br. at 26-27.) These arguments are meritless.

As discussed above, § 113(h) does not bar all state law property damage claims. To the extent a state law plaintiff seeks an alternative environmental remedy related to the goals of an ongoing CERCLA cleanup, however, it is barred by CERCLA's plain language. *See McClellan*, 47 F.3d at 328-30; *Fort Ord*, 189 F.3d at 831 ("[Section] 113(h) does not preclude all lawsuits, only those that are directly related to the goals of the cleanup itself.").

Landowners' contention that Atlantic Richfield is using § 113(h) to "avoid its common-law responsibility" is equally baseless. Atlantic Richfield has spent hundreds of millions of dollars cleaning up the Site, and will continue to work with EPA to conduct any and all remedial actions necessary for the protection of human health and the environment. Landowners may assert—and have asserted—state

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(D.D.C. 2012) (rejecting argument that CERCLA's savings clause affects the operation of § 113(h) because § 9659(h) "makes the primacy of CERCLA § 113(h) explicit").

law claims for property damages independent of their proposed alternative environmental remedy. But they are not free to perform any remediation project of their choosing—regardless of what EPA has determined to be appropriate based on decades of research, monitoring, and testing—at a federal Superfund Site.

## CONCLUSION

For the foregoing reasons, Atlantic Richfield respectfully requests that the Court deny Landowners' Motion, enter summary judgment in favor of Atlantic Richfield, declare that Landowners' proposed remediation plan constitutes an impermissible "challenge" under CERCLA § 113(h), and enjoin Landowners from performing their proposed restoration plan.

Dated this 6th day of May, 2016.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to L.R. 7.1(d)(2)(E), I certify that this Plaintiff Atlantic Richfield Company's Combined Reply in Support of its Motion for Summary Judgment and Response to Defendant' Motion for Summary Judgment is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2010, is 5,479 words long, excluding Caption, Certificate of Service, Certificate of Compliance, Table of Contents, and Table of Authorities.

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**CERTIFICATE OF SERVICE**

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